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No. .....

In The
Supreme Court Of The United States
October Term, 1981

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RUBY W. WHITTED,
Petitioner

vs.

JERRY T. LYALL, et al,
Respondents

o

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

1. Did a genuine issue of fact exist sufficient to withstand the defendant's motion for summary judgment on the issue of;

a. Denial of Due Process?

b. Termination from employment by coercing plaintiff into resigning?

c. Discrimination against plaintiff because of her sex and race?

d. Conspiracy by state officials to deprive plaintiff of her civil rights?

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Ruby W. Whitted prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on December 4, 1980.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is an unpublished *Per Curiam* opinion rendered December 4, 1980. A copy of this opinion is included in the Appendix hereof as EXHIBIT "A".

The District Court's Opinion granting the defendant's motion for summary judgment appears in the Appendix hereof as EXHIBIT "B" and is unpublished.

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JURISDICTION

Jurisdiction in this cause is premised upon 28 U.S.C. § 1254 (1) for review, by certiorari, of the judgment and opinion of the United States Court of Appeals for the Fourth Circuit. A written *per curiam* opinion was issued by that court on December 4, 1980.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the Fifth and Fourteenth Amendments to the Constitution as well as 42 USC § 1981, 42 USC § 1983, 42 USC § 1985, and 42 USC § 1988, alongwith the North Carolina State Statute G.S. 126-35, G.S. 126-36, G.S. 126-39 and the relevant provisions of the State of North Carolina personnel policy and procedure are set forth in the Appendix hereof as Exhibit "C".

———— o ————

STATEMENT OF THE CASE

This is a civil action brought by the plaintiff pursuant to Title 42 USC § 1981, 42 USC § 1983 and 42 USC § 1988 of the Civil Rights Act of 1871 and for the

protection of a PROPERTY INTEREST secured to her by statute by the State of North Carolina in G.S. 126-35 and protected by the Privileges and Immunities, Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendment to the United States Constitution.

All of the defendants are either state officials or agents, servants and employees of the State of North Carolina.

This action was commenced by the filing of a complaint in the United States District Court, Eastern District of North Carolina (Wilson Division). After the discovery period, and after various hearing on motions duly and regularly filed, both parties having filed motions for Summary Judgment, the District Court, DUPREE, J. allowed the defendants motion for Summary Judgment dismissing plaintiff's complaint, ruling, inter alia, there was no genuine issue of fact. From this adverse ruling the plaintiff appealed to the United States Court of Appeals, For The Fourth Circuit. The United States Court of Appeals, *Per Curiam*, affirmed the United States District Court.

Plaintiff premises this Writ of Certiorari to this Honorable Court upon 28 USC § 1254 (1).

On Friday, December 15, 1978 at approximately 8:30 a.m., the defendant Royall Smith called plaintiff to his office. Upon arrival, the defendant Smith advised plaintiff that he had heard she had sent inquires to the Personnel Office regarding retirement and asked plaintiff whether she had stated her intentions in writing. Upon learning that plaintiff had not, he informed plaintiff that as of the following Monday, he was placing her in a

Health Care Services Coordinator position; and further explained to plaintiff that "it is apparent from the way you dressed you do not need the job." At the time the defendant told plaintiff he was placing her in a Health Care Services Coordinator position, no such position existed at O'Berry Center; no job description existed for the position; no salary for the position had ever been budgeted by the State nor had there been an allocation or authorization for the position. State policy prohibits the offering of a position to an employee unless and until the same shall have been allocated and budgeted; the defendant, Jerry T. Lyall, in his capacity as Director had neither applied to the State Personnel Commission nor the Department of Human Resources for the position prior to the time the position was discussed with the plaintiff; the position has never been applied for. During the course of the conversation, plaintiff became emotional and upset. She cried. The defendant left the room and brought plaintiff a paper towel; upon his return to the room and unknowing to plaintiff he called in his secretary, Kathy Barden, and a Personnel Technician, Ann McLamb, and with the help of Smith, Ann McLamb dictated for plaintiff to sign a letter of resignation. Plaintiff refused to sign the letter of resignation. Plaintiff did not dictate the letter of resignation nor did she have anything to do with it. Plaintiff did not sign the letter. Facing the choices of demotion, retirement or dismissal, plaintiff called her husband, who by occupation is an Attorney at Law. Plaintiff's husband arrived and thereupon they went to see Ann McLamb, the Personnel Technician. After receiving assurances from Ann McLamb that plaintiff would loose no leave benefits, accumulated vacation time and years of service, plaintiff rewrote the letter or resignation predicated on the assurance letter from Ann McLamb.

At the time of plaintiff's meeting with Smith, she was never furnished a written statement setting forth in numerical order specific acts or omissions constituting the reason for removing or suspending plaintiff from her position as Unit Director to the so called position of Health Care Services Coordinator.

Plaintiff already had a job description defining and delienating her duties and responsibilities. Her position number was 72.

Preceding December 15, 1978. the defendant, Jerry T. Lyall, a white male began his employ as Director of O'Berry Center on July 18, 1978. On August 30, 1978, he summoned plaintiff to his office for the purpose of reprimanding her for poor work performance; he told plaintiff that he visited her unit on August 29, 1978, and found it in shambles and there was a resident restrained without a doctor's order; that he was giving her an oral warning. No oral warning was ever put in writing as is required by the State Personnel Manual. Through discovery, plaintiff learned that it was the defendant, Steve Biggs a white male and a Brenda Davis, a white female who actually came to the unit. He, Biggs, told Lyall what he saw. Biggs was not plaintiff's supervisor at the time nor was Brenda Davis.

In September 1978, the defendant Biggs became the immediate supervisor of plaintiff and was employed as Acting Director of Habilitative Services. He began by sending plaintiff a series of memos about matters that were "brought to his attention". Plaintiff, in reply memos, asked the defendant, Biggs, the basis for his information. Biggs did not answer any responsive memos. The reason he, Biggs, did not respond to plaintiff was because the defendant Lyall had told him not to respond

to plaintiff's memos which plaintiff sent to him.

On November 16, 1978, the defendant, Royall Smith, a black male began his employ at O'Berry Center. He became plaintiff's immediate supervisor.

Plaintiff sent memos to Smith and raised questions and inquiries to the defendant Smith but the defendant Smith did not respond.

After the defendant Lyall became employed at O'Berry Center and in September 1978, the defendant Lyall requested of plaintiff to submit another job description further defining and delienating her duties and responsibilities as the ELC V Director. Plaintiff obeyed this request. On September 29, 1978, in commenting on plaintiff's job description, the defendant Lyall stated he had not been Director long enough to evaluate plaintiff's position. The defendant Lyall took no exception to plaintiff's evaluations.

On Thursday, December 14, 1978, and prior to the Friday morning of December 15, 1978, the defendant Smith dictated and had typed, a letter suspending plaintiff from her position as ELC V Director.

This letter of suspension was to suspend plaintiff from her position for having the news media within the plaintiff's unit. Plaintiff had no prior knowledge of the news media's arrival nor was she present when the news media arrived. The defendant Lyall told Smith not to send the letter of suspension, that you can't, "do it that way". It was common knowledge among secretaries in the administration building that something was going to happen to plaintiff but no one knew what.

Prior to December 15, 1978, Danny Rouse, the Personnel Director, advised the defendant Smith in

December 1978 how to discipline plaintiff. He went to defendant's Smith's office where this discussion took place.

Prior to the filing of this Civil Action and on November 6, 1978, plaintiff filed an employee grievance directly with the defendant, State Personnel Commission alleging and contending that the defendant, Jerry T. Lyall, was trying to oust her from her position and that the defendant Lyall was discriminating against her because she is black or a female and that her due process rights were being violated. The State Personnel Commission refused to grant plaintiff a grievance hearing and referred plaintiff to the State Department of Human Resources, another State Agency. Plaintiff never received an administrative hearing prior to bringing this action.

REASONS RELIED ON FOR THE ALLOWANCE OF WRIT

The decision below is in conflict with the decision of another Federal Court of Appeals on the same subject matter involving genuine issues of a material issue of fact. The Federal Court of Appeals, by its decision, has sanctioned such a departure by a lower court as to call for the exercise of this court's power of suervision. See *Wilson vs. Scultz*, 1973, 475 F. 2d 997, 155 U.S. App. D.C. 4, in light of Whitted vs. Lyall, decided E. Supp. February 8, 1980 (E.D.N.C. 1980), Appendix P. 3 *Exhibit B.*

Secondly, Congress has enacted 42 USC § 1981, 42 USC § 1983, 42 USC § 1985 (1) (2) (3) and 42 USC §

1988. By its enactment and the enactment of subsequent supporting legislation, it is the intent of Congress and this court that there shall be no constitutionally sanctioned discriminiation in the United States of America due to race, sex, religion, age or previous conditions of servitude. If this truism is accepted, then American citizens have every right to rely on the plain meaning of the statutes to guide their every day lives. Constitutionally prohibited discrimination against citizens protected by the constitution, especially in the field of employment, is noteworthy here, plaintiff argues, for the lack of employment, due to denials of constitutionally protected rights, and due to racism is tantamount to economic strangulation. The case at bar brings into focus a case of employment discrimination, unequal enforcement by state officials and, due process denial by state officials. It is further significant in that the State of North Carolina has prescribed due process standards and bestowed a PROPERTY INTEREST IN A JOB AND AT THE SAME TIME DECLARED THE PROPERTY INTEREST PROTECTED BY THE UNITED STATES CONSTITUTION.

The issues raised by this case also epitomizes an area of employment discrimination and an area of the law which directly affects the very life blood, not only of black Americans, but also of all American citizens as well. Even though black Americans and women have been within a protected class they have been deprived of the full enjoyment of life, liberty and the pursuit of happiness as guaranteed to them and protected by the Constitution of the United States of America.

The approval by the court below of the trial courts allowing the defendants motion for summary judgment makes a traversity of the plain meaning of 42 USC §

1981, 42 USC § 1983, 42 USC § 1985 (1) (2) (3) and 42 § 1988 as well as G.S. 126-35.

We are dealing here with a state statute, (G.S. 126-35), enacted by the State of North Carolina clearly bestowing upon five year employees a PROPERTY INTEREST in their job.

Plaintiff submits that this court should grant the Writ, notwithstanding the enactment of the statute but for the further reason that the defendants are state officials and this is a matter involving state action contravening 42 USC § 1983 and judicial interpretations thereunder.

Plaintiff further ask this court to accept and apply the fact that she was denied due process of law in that she was coerced into being terminated from her position and had no knowledge that the defendants had engaged in a conspiracy to deprive her of her PROPERTY INTEREST-PROTECTED job. Plaintiff submits that a genuine or material issue of fact existed as to voluntariness of the termination percluding summary judgment.

Plaintiff further shows, and the defendants admit, that state policy prohibits the offering of a position to a person unless and until there is an ALLOCATION for the position and the position is budgeted for and funds set aside for the position. In the instant case, the plaintiff was offered a position which was neither allocated nor funds budgeted or set aside. This fact was admitted in the REQUEST FOR ADMISSIONS served on plaintiff pursuant to Rule 36(a) of the Federal Rules of Civil Procedure.

Plaintiff, in order to buttress the allegations in her

complaint, through depositions, elicited proof that:

(a) No such position existed.

(b) That she was a permanent state employee within the plain meaning of G.S. 126-35 in that she had worked for the State of North Carolina for a period of five consecutive years and therefore should rely on the protection of the statute.

(c) That the defendant Smith, the day before sending for plaintiff, had written a letter removing plaintiff, summarily, from her position, without first stating any reasons, in numerical order, for the removal; this, plaintiff contends supports her issue of a conspiracy to deprive.

(d) That she is a black female and within the protected class.

(e) That there was no justifiable reason to remove her from her position or offer to her a non existant position.

(f) The defendants actively recruited and replaced plaintiff with a white employee.

(g) The defendant, O'Berry Center, had no affirmative action plan in effect.

(h) The white female employee who replaced plaintiff had far less qualifications for the position than plaintiff had when she held the position.

(i) The defendant Lyall, soon after his employ-

ment at O'Berry Center, began to harass and fire female employees both black and white. This issue supported plaintiff's allegation and issue that the defendant Lyall discriminated against women ir general and black women in particular.

(j) The acts and conduct of the defendants Lyall, Biggs and Smith i,e., forced termination from employment, failing to communicate with plaintiff, offering plaintiff a fictitious position, efforts to demote or suspend plaintiff without a hearing or giving her anything IN WRITING, failing to follow state policy, procedures and guidelines, falsely accusing plaintiff of restraining a child without a doctor's order, though independant facts, yet, when put together they form a chain of events sufficient to raise a genuine issue of a material fact sufficient to overcome the defendant's motion for summary judgment.

(k) The defendant Smith informed plaintiff that the way she was dressed she, "didn't need the job."

(l) That the defendant Lyall had no use for women who played a leading role in his administration and there were several people including plaintiff who, "had to go."

The North Carolina courts have long recognized that employees of the state have a PROPERTY INTEREST in their jobs where they have been so employed for a period of five consecutive years. See *FAULKNER vs. NORTH*

CAROLINA DEPARTMENT OF CORRECTIONS 428 F. Supp. 100 (W.D.N.C. 1977). *LUCK vs. EMPLOYMENT SECURITY COMMISSION,* 272 SE2d 607, (December 16, 1980). *STEVENSON vs. NORTH CAROLINA DEPARTMENT OF INSURANCE* 31 NC App. 299, 229 SE 2nd 209 (1976). *JONES vs. DEPARTMENT OF HUMAN RESOURCES,* 300 N.C. 687, 268 SE 2nd 500 (1980).

The issue of failure to comply with the due process provisions of the State Statute (G.S. 126-35) was raised by the plaintiff in her complaint, which issue, the trial court below failed to recognize and apply. Surely plaintiff should have been allowed to withstand the motion for summary judgment on this issue if no other. Being a black female, plaintiff cannot help but conclude, especially where policy, procedure and guidelines are not followed, that the State of North Carolina has a dual standard of objective due process for whites and a subjective standard of due process for blacks. Due process of law "implies a conformity with natural and inherent principles of justice and forbids the taking of one man's property or right of property for another's or the State's benefit without compensation, and requires that no one shall be condemned in person or property without opportunity to be heard." *HOLDEN vs. HARDY,* 169 US 366, 18 S Ct. 383, 42 L Ed 780. See also *BUCHALTER vs. NEW YORK.* 319 US 427, 63 S Ct. 1129, 87 L ED 270 for the proposition that the due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principals of liberty and Justice. The act of a public official is the Act of the State in depriving an individual of property, life or liberty without due process of law. *NEAL vs. DELAWARE,* 103 US 370. *CHICAGO B & Q R CO. vs. CHICAGO,* 166

US 226, 17 S Ct. 581, 41 L ED 979. ....."and it is well established that for action to be considered as taken under color of state law within the meaning of the pertinent provisions of the *CIVIL RIGHTS ACT*, there must be a misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." 14 C.J.S. Supp. 115. *MONROE vs. PAPE*, 365 US 167, 81 S Ct. 473, 5 L Ed 492.

Plaintiff further draws the distinction here that the property interest arose from an act of the legislature and not from the contract of employment. In *BOARD OF REGENTS vs. ROTH*, 408 U.S. 564, 92 S. Ct. 2701, 33 L Ed 2d. 548 (1972) this court held that where a state enacts a statute such as G.S. 126-35 and creates an interest in continued employment such interest is safeguarded by due process under the Fourteenth Amendment of the United States Constitution.

By approving the opinion of the court below is to give tacit approval for state officials not to follow state statutes enacted for the benefit of its employees particularly when a black female employee seeks the due process protection of the statute.

Where a motion of summary Judgment is made, the court must take into consideration the complaint, answer, depositions of witnesses, affivdavits request for admissions and the credibility of the affiant. See *CONRAD vs. DELTA AIRLINES, INC.* C.A. ILL. 1974 494 F. 2d 914 to the effect that in cases where the underlying issue is one of motivation, intent, or some other subjective fact, summary judgment is inappropriate. See also *JONES vs. GENERAL TIRE & RUBBER CO.*, C.A. IND. 1976, 541 F. 2d 660 to the effect that questions of intent are inappropriate for summary judgment. *JOHNSON vs.*

BOTICS, C.A. ILL., 1976, 537 F. 2d 930. *FITZ-SIMMONS vs. BEST*, C.A. ILL., 1976, 528 F. 2d 692. As a general proposition, summary judgment is inappropriate if issues of motive, intent and other subjective feelings are involved. *STERLING NATIONAL BANK & TRUST CO. OF NEW YORK vs. FIDELITY MORTGAGE INVESTORS*, C.A. N.Y. 1975, 510 F. 2d. 870.

In an action by a former employee of the Bureau of Narcotics against the Secretary of Treasurer and Commissioner of the bureau to have declared involuntary a resignation he had signed and for related relief, a genuine or material issue of fact existed as to voluntariness of the resignation hence the motion for summary judgment should have been denied. *WILSON vs. SHULTZ* 1973, 475 F 2d 997, 155 US App. D.C. 4.

The court below concluded that the plaintiff did not carry the burden of proof on the issue that the Health Care Services "position" was a demotion and therefore, the question of a proof of property interest must fail. To the contrary. Plaintiff, however, calls to this courts attention that the general rule of evidence is that where the evidence as to an issue is peculiarly within the control of a party, the burden of evidence on that issue rest on him who has the peculiar knowledge, is applied in Civil Rights Proceedings. See 31A C.J.S. § 113 to the effect that, "In the Administration of Justice, it is desirable that the burden of producing evidence is best placed on the party best able to sustain it, and there is authority for the view that the burden of evidence as to an issue rest on the party having the greater means of knowledge. A narrower formulation is that where the evidence as to an issue peculiarly within the knowledge or control of a party, the burden of evidence as to such issue rests on him. Note 60; *JOYCE VS. SELL*, 233 NC 585, 64 SE 2d 837;

ANTHONY VS. AMERICAN EXPRESS CO., 188 N.C. 407, 124 SE 753, *WILLIAM M. LLOYD CO. VS. POYTHRESS*, 185 N.C. 180, 116 SE 584. It is very generally held that, where the party who has not the general burden of proof possesses positive and complete knowledge concerning the existence of facts which the party having that burden is called on to negative, or has peculiar knowledge or control or evidence as to such matters, the burden rests on him to produce the evidence, the negative averment being taken as true unless disproved by the party having such knowledge or control. Note 62,5; *SPEAS VS. MERCHANTS BANK AND TRUST CO. OF WINSTON-SALEM*, 188 N.C. 524, 125 SE 398. ....."The court will more readily hold that a party has sustained the burden of evidence where the issue is one as to which the evidence is peculiarly within the adverse party's knowledge or control."

The distance to which plaintiff must carry the burden of proof is considerably shortened when his opponents decline to offer evidence peculiarly within their control. The burden of the issue of the Health Care Services Coordinator "position", and its comparability to that of a Unit Director and the suggestion by defendants that this was a lateral transfer and not a demotion should have rested on the defendant. Since there was no such position previously allocated and previously budgeted, then, arguendo, how could plaintiff even expect to establish that she would have been paid less as a result of the so-called change in duties. To require this of plaintiff is to engage in *HYPERBOLE*.

Plaintiff submits that she has carried the burden of proof. See 14 C.J.S. Supp. § 163 at page 270 to the effect that."In a suit brought under the provision of the *CIVIL RIGHTS ACT* authorizing a civil action for the depriva-

tion of rights, plaintiff has the burden of proof, and must establish all elements which are essential to maintain the cause of action. Plaintiff must prove the alleged deprivation of rights, that the deprivation resulted in a breach of duty owed by defendant, that the deprivation was of a right secured by the constitution and laws of the United States and that the defendant was acting under color of state law. It is not necessary to show improper motive on the part of the person charged."

Plaintiff, in her complaint asked for a Trial by Jury in the exercise of her constitutionally guaranteed right pursuant to the Seventh Amendment to the United States Constitution. Plaintiff notes in passing that Rule 56 of the Federal Rules of Civil Procedure is in derogation to the Seventh Amendment, which is all the more reason this Writ should issue. This Amendment should be jealously guarded, expecially in Civil Rights cases.

CONCLUSION

For the aforesaid reasons, a Writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully Submitted,
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February 19, 1981

APPENDIX

EXHIBIT A

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

Ruby W. Whitted, Appellant,

—versus—

Jerry T. Lyall, Individually and Jerry T. Lyall, Director of O'Berry Center, Steve Biggs, Individually and Steve Biggs, Directors Quality Assurance O'Berry Center; Royall Smith, Director Habilitative Services, Dr. Anne Wolfe, Individually and Dr. Anne Wolfe, Deputy Director Mental Retardation Services; Dr. Sarah T. Morrow, Secretary of State of N.C. Department of Human Resources; North Carolina Department of Human Resources; James B. Hunt, Jr., Governor, State of North Carolina; O'Berry Center; State Personnel Commission; Department of Administration. Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilson. F.T. Dupree, Jr., District Judge.

Argued: November 12, 1980 Decided: December 4, 1980

Before WINTER, RUSSELL and SPROUSE, Circuit Judges.

Earl Whitted, Jr. (Whitted, Jordan & Matthewson on brief) and Floyd B. McKissick for Appellant; Everett Noland, Assistant Attorney General (William F. O'Connell, Ann Reed, North Carolina Department of Justice on brief) for Appellees.

PER CURIAM:

The plaintiff/appellant was employed as a Unit Director of Environmental Living Complex V at the O'Berry Center, an institution operated by the State of North Carolina for the mentally retarded. She resigned effective December 15, 1978. She has sued the Center's Director Jerry Lyall, and her immediate supervisor Royall Smith, Director of Habilitative Services, and others, on the ground that her resignation was induced by harassment on the part of the defendants Jerry Lyall, the Director of the Center, and Royall Smith, her immediate supervisor. She sued under §§ 1981 and 1983, 42 US.C. asserting that her resignation was in effect a discharge, that such discharge was violative of her due process rights and, in addition, resulted from discrimination. The defendants, after answering, and after considerable discovery, moved for summary judgment. The District Court in a carefully considered opinion, found that there

was no genuine issue of fact and that there was no merit in plaintiff's claims under §§ 1981 and 1983. It accordingly granted summary judgment in favor of the defendants. The plaintiff appealed. We affirm on the basis of the opinion of the District Court.

AFFIRMED.

EXHIBIT B.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

RUBY W. WHITTED, Plaintiff VS. JERRY T. LYALL, et al., Defendants	NO. 79-1-CIV-8 MEMORANDUM OF DECISION AND ORDER

This action was brought by Ruby W. Whitted under the Fifth and Fourteenth Amendments to the Constitution and Sections 1981 and 1983 of Title 42, United States Code. Her complaint sets forth various constitutional infirmities involved in her alleged involuntary resignation from her position as a Unit Administrator at O'Berry Center, a state-owned institution for the mentally retarded. The case came before the court on December 14,

1979 for a hearing on the parties' cross-motions for summary judgment. For the reasons set forth herein, plaintiff's motion is denied and defendants' motion for summary judgment is granted.

Plaintiff, a 50-year-old black female, had been employed by the State of North Carolina at the O'Berry Center for twenty-one years. A registered nurse, she ultimately became a Unit Director of Environmental Living Complex V ("ELC V"). Defendant Jerry Lyall, who is white, currently serves as Director of O'Berry , and defendant Royall Smith, who is black, serves as Director of Habilitative Services at O'Berry. Plaintiff has alleged that Lyall is prejudiced against the female sex in general and blacks in particular. Lyall's prejudice allegedly served as the motivating factor for his calling plaintiff to his office on August 30, 1978, for the purpose of reprimanding her for allegedly poor work performance. Plaintiff contends that Lyall told her he had visited her unit, "found the unit in shambles," and that a resident working under her supervision was seen restraining a patient without a doctor's order. According to Whitted, Lyall never visited her unit, the unauthorized restraint of a patient never occurred, her work was satisfactory and Lyall knew his statements to be false. Plaintiff asserts that August 30, 1978 marked the first tangible evidence of a conspiracy of all the defendants to force her to leave the O'Berry Center.

Further, plaintiff asserts that on December 15, 1978, she was summoned to the office of defendant Royall Smith. Smith allegedly told her that he had learned she had sent inquiries to the State Personnel Office regarding retirement benefits and asked whether she had stated her intentions to retire in writing. When the plaintiff replied that she had not done so, Smith told her that as of

Monday, December 18, 1978, he was assigning her to the position of Health Care Services Coordinator. Plaintiff contends this reassignment constituted a demotion and that Smith told her that "it was apparent from the way (you) dressed and other indications that (you) did not need the job." As the conversation progressed, Smith purportedly called his secretary into the office and dictated to her a letter of resignation for the plaintiff. She claims she refused to sign the letter during the meeting and that faced with the choices of demotion, retirement or dismissal, she later submitted her own letter of resignation. Her last day of work at O'Berry was January 3, 1979.

Plaintiff asserts that defendants' actions deprived her of due process of law as provided in N.C.G.S. § 126-35 (Supp. 1977), and the Fourteenth Amendment to the United States Constitution. As an essential prerequisite to the application of due process protections, plaintiff recognizes that a "person (must have) property in the particular thing of which he is alleged to have been deprived." (Plaintiff's memorandum of law in support of motion for summary judgment, filed October 3, 1979, at 5.) In this circuit, "it is settled that to be entitled to a due process hearing, one must have suffered by the state action a loss of either a property or a liberty interest." *Clark v. Whiting*, 607 F. 2d 634, 641 (4th Cir. 1979), *citing Arnett v. Kennedy*, 416 U.S. 134 (1974).

Plaintiff correctly contends that by virtue of her twenty-one-year-term of employment with the State of North Carolina she had acquired a property interest in her job, *Faulkner v. North Carolina Department of Correction*, 428 F. Supp. 100 (W.D.N.C. 1977); but the issue in the present case must be more narrowly drawn. Rather than be reassigned to the position of Health Care Services

Coordinator, plaintiff chose, within a matter of hours of learning of her reassignment, to resign her employment. (Deposition of Ruby Whitted testified that before submitting her resignation the duties and salary of the Health Care Services Coordinator were not explained to her nor did she inquire about such matters. *ID* at 28. Clearly plaintiff assumed her pending transfer constituted a demotion on the basis of her December 15, 1978 conversation with Royall Smith, Jr., and the circumstances surrounding that confrontation.

Plaintiff has failed to set forth evidence, admissible for purposes of Rule 56, to establish a material issue of fact on the question of whether the proposed lateral reassignment constituted a demotion. Defendants' assertions that Mrs. Whitted was to retain her salary level and other benefits remain uncontroverted. Therefore, the issue herein is whether plaintiff held a property interest in the employment *position* of Unit Coordinator.

The court noted initially that the employer holds a fundamental right to assign employees to positions the employer deems, in the exercise of its managerial discretion, most expedient." *Macy's Missouri-Kansas Division v. N.L.R.B.*, 389 F.2d 835, 714 (5th Cir. 1968) (sic). Mrs. Whitted would be unable to claim a denial of either statutory or constitutional due process if defendants had simply decided to reassign her to the position of Unit Coordinator of another unit. Similarly, the reassignment to the position of Health Services Coordinator cannot be found to constitute such an alteration in pay or position as to be considered a demotion or constructive firing. Regardless of an employee's experience, ability and job performance, employers must be accorded reasonable discretion in designating duties and responsibilities. Although the circumstances of Mrs. Whitted's reassign-

ment may not have been entirely gracious or forthright, the court detects no evidence of an abuse of the defendants' managerial authority and discretion.

Thus, the defendants' actions did not deprive plaintiff of a property interest and no Fourteenth Amendment due process rights were violated. Further, since no evidence has been presented to show plaintiff was discharged, suspended or reduced in pay or position prior to her resignation, the provisions of N.C.G.S. § 126-35 are not applicable to the present case.

Plaintiff further alleges that the defendants are prejudiced against blacks and women and that their racial and sexual prejudice was the motivation force behind her reassignment. In support of this allegation, Mrs. Whitted argues that defendants had no reason to reassign her to the "non-existent" position, she was replaced with an actively-recruited white person, the reassignment was an attempted demotion, her replacement was less qualified than the plaintiff when she held the position of Unit Coordinator, prior to her resignation she was told to work a straight 8:00 a.m.to 5:00 p.m. shift while other

1 Plaintiff makes considerable argument of the fact that the position of Health Care Services Coordinator had neither been classified nor authorized by the State Department of Personnel at the time she was informed of the reassignment. While acknowledging that the state personnel policy prohibits the filling of positions which do not technically exist, defendants argue that employees are frequently placed in position is formally allocated. The court has found plaintiff to have suffered no deprivation of a property or liberty interest by the proposed reassignment and this conclusion is unaltered by the fact that the position of Health Care Services Coordinator had not been officially approved. Defendants' failure to conform to state policy in this regards does not provide plaintiff with a means of "bootstrapping" her claimed deprivation of due process.

employees were not so instructed, the defendants had no affirmative action plan and she is a black female. Plaintiff contends defendants' actions violated her rights protected under Sections 1981 and 1983 of Title 42 of the United States Code.

The circumstances of the present case are relatively unique in that they involve an internal transfer or lateral reassignment of an employee. Because the case does not involve issues of hiring, demotion or dismissal, many of the traditional evidentiary standards are inapplicable. It is well settled, however, that the plaintiff must present a prima facie case of racial discrimination before the employer has the burden to articulate some legitimate non-discriminatory reason for his action. *See McDonnell Douglas Corporation v. Green,* 411 U.S. 792, 803-805 (1973) *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 1254 (5th Cir. 1977). Plaintiff has failed to meet this inital and most essential burden.

While asserting that defendants had no reason to reassign her to the new position of Health Care Services Coordinator, and that such reassignment was an attempt ed demotion, plaintiff has offered no evidence to support her conclusion that defendants' actions were motivated by actionable prejudice. In answer to questions pertaining to her allegations of harassment by defendants, plaintiff tells

2 While recognizing that the Supreme Court in *McDonnell Douglas* was interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, the court notes that the standards of proof have been interpreted to be the same under Title VII and Section 1981. *See Pennsylvania v. Local U. 542,* 469 F. Supp. 329 (E.D.PA. 1978); *Walker v. Robbins Hose Company No. 1, Inc.*, 465 F. Supp. 1023 (D. Del. 1979). Throughout their Written memoranda and during oral argument, both parties have almost exclusively supported their positions with Title VII decisions.

of one meeting with defendant Lyall and one confrontation with defendant Smith. Her account of the meeting with defendant Lyall on August 31, 1978, complains that Lyall lied to her about having visited Unit V and found it in "shambles."

Even if Lyall's statement at this meeting could be found to be tainted with racial or sexual prejudice, a conclusion which the court finds highly improbable, plaintiff offers no other evidence of discriminatory harassment by Dr. Lyall. *See* Deposition of Ruby Whitted at 15-21, 107-109, 128-132. The circumstances of plaintiff's December 15, 1978 meeting with defendant Smith have already been stated. Although the method chosen by Mr. Smith, himself a black, to inform plaintiff of her reassignment might not be considered to have been the most gracious or tactful, the court detects no evidence that his actions were motivated by racial or sexual prejudice.

Further, plaintiff alleges, that she was harassed by three of four memorandums she received from defendant Dr. Biggs. *Id.* at 245. She states that these memos were not racially discriminatory but were harassing simply because they were not true. *Id.* at 138. Again, plaintiff has failed to produce any evidence tending to show that this defendant's actions were motivated by racial or sexual prejudice.

Although it is well settled that statistical evidence may be utilized to establish a prima facie case of discrimination under Section 1981, *Sherrill v. J.P. Stevens and Company, Inc.*, 410 F. Supp. 770, 782 (W.D.N.C. 1975), *citing United States v. Chesapeake & Ohio Railway Company*, 471 F. 2d 582, 586 (4th Cir. 1972), *cert. denied*, 411 U.S. 939 (1973), plaintiff has offered no such evidence. However, defendants have offered data in support of their uncontroverted conclusion that as of

October 25, 1979, thirty-one per cent of the officials and administrators at O'Berry are black and forty-two per cent are female. Further, forty per cent of the professional staff at the institution are black and sixty-eight per cent are female. These statistics weigh strongly against plaintiff's conclusory allegations of race and sex discrimination.

In regard to plaintiff's allegations of a conspiracy against her in violation of 42 U.S.C. § 1985, she must allege facts showing a conspiracy against her because of her membership in a protected class. *Lessman v. McCormick*, 591 F.2d 605, 608 (10th Cir. 1979); *Harrison v. Brooks*, 519 F.2d 1358, 1360 (1st Cir. 1975). Plaintiff states that every day she received memos from the defendants "accusing or complaining or whatever about (her) management," and "when you look at all these memos collectively that were sent....one right after the other, there was a conspiracy." (Deposition of Ruby Whitted at 205.) Additionally, she argues that the events which took place on December 15 in defendant Smith's office are further evidence of a conspiracy to make her resign her position at O'Berry. The memos and December 15th conversation have previously been considered by the court and found devoid of race or sex prejudice, and no other evidence of an intentional pattern and practice of discrimination actionable under Section 1985 has been offered. Consquently, plaintiff's allegation of a conspiracy "because of" her race and sex must be dismissed.

Accordingly, defendants' motion for summary judgment is granted and all other pending motions are denied.

SO ORDERED.
/s/ F.T. Dupree, Jr.
F.T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

February 8, 1980.

EXHIBIT C

FIFTH AMENDMENT
CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT
CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

42 UNITED STATES CODE § 1981

All persons within the jurisdiction of the United States shall have the same right in every State and

Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 UNITED STATED CODE § 1983

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 UNITED STATES CODE § 1985

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) If two or more persons in any State or Territory

conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws:

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons

engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right, or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 UNITED STATES CODE § 1988

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the inflicition of punishment on the party found guilty.

Article 8

GENERAL STATUES OF NORTH CAROLINA

(Employee Appeals of Grievances and Disciplinary Action) *G.S. 126-35.* Written Statement of Reason For

Disciplinary Action. No permanent employee subject to the State Personnel Act shall be discharged, suspended, or reduced in pay or position, except for just cause. In cases of such disciplinary action, the employee shall, before the action is taken, be furnished with a statement in writing setting forth in numerical order the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights. The employee shall be permitted 15 days from the date the statement is delivered to appeal to the head of the department. A copy of the written statement given the employee and the employee's appeal shall be filed by the department with the State Personnel Director within five days of their delivery. However, an employee may be suspended without warning for causes relating to personal conduct detrimental to State service, pending the giving of written reasons, in order to avoid undue disruption of work or to protect the safety of persons or property or for other serious reasons. The employee, if he is not satisfied with the final decision of the head of the department, or if he is unable, within a reasonable period of time, to obtain a final decision by the head of the department, may appeal to the State Personnel Commission. Such appeal shall be filed not later than 30 days after receipt of notice of the department head's decision. (1975, c. 667, s.10.)

G.S. 126-36. Appeal of unlawful State employment practice. Any State employee or former State employee who has reason to believe that employment, promotion, training, or transfer was denied him or that demotion, layoff or termination of employment was forced upon him in retaliation for opposition to alleged discrimination or because of his age, sex, race, color, national origin, religion, creed, political affiliation, or physical require-

ments constitute a bona fide occupational qualification necessary to proper and efficient administration, shall have the right to appeal directly to the State Personnel Commission. (1975, c. 667, s.10; 1977, c. 866, ss. 13, 16.)

G.S. 126-39. State employee defined. For the purpose of this Article, except for positions subject to competitive service and except for appeals brought under G.S. 126-16 and 126-25, the terms "permanent State employee," "permanent employee," "State employee" or "former State employee" as used in this Article shall mean a person who has been continuously employed by the State of North Carolina for five years at the time of the act, grievance, or employment practice complained of. (1977, c.866, s. 15)

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COMMITMENTS AND POSITION VACANCY

An appointment may be made only if a classified and budgeted position vacancy exists in the position complement as authorized for the agency. A commitment should not be made to an employee or an applicant without the approval of the Office or State Personnel. Questions about an employee's or applicant's meeting minimum education and experience requirements or about salary or position classification should be directed to the Office of State Personnel. Questions about funds or other fiscal matters should be directed to the Office of State Budget.

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O'BERRY CENTER ADMINISTRATIVE POLICY MANUAL

SUBJECT: Position Vancancies

Policy Statement: It shall be the responsibility of O'Berry Center's Personnel Officer to advertise, solicit, receive applications, and interview applicants for vacancies at the Center. All complex administrators and /or department heads shall not promise a vacancy in their area to anyone without close coordination with the Personnel Officer. Proper accountability for reporting and processing vacancies through the Personnel Officer is the responsibility of complex administrators and/or department heads. All applications for employment will be kept in the Personnel Office. Any complex administrator and/or department head can come to Personnel and view applications on file.

Goals:

1. All complex administrators and/or department heads are responsible for coordination of their staff position vacancies through the Personnel Office.
2. Complex administrators and/or department heads are accountable to the Personnel Officer for proper advisement in filling their vacant staff positions.
3. Complex administrators and/or department heads are to be made knowledgeable that no vacancy is to be filled prior to advertising in the Personnel Bulletin for a period of at least one week.

Purpose: To have all staff aware that vacancies cannot be considered until properly coordinated through the Personnel Officer.

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PROCEDURE-DISCRIMINATION

Any applicant for State employment or State employee, or former State employee who has reason to believe that employment, promotion, training, or transfer was denied him or that demotion, lay-off or termination of employment was forced upon him because of his age, sex, race, color, national origin, religion, creed, political affiliation, or physical disability except where specific age, sex or physical requirements constitute a bona fide occupational qualification necessary to proper and efficient administration, shall have the right to appeal directly to the State Personnel commission as provided in Step 4 above. A permanent State employee has the right to appeal using the grievance procedure established within his agency if he so desires. An employee or applicant must appeal an alleged act of discrimination to an agency head or State Personnel Commission within 30 days of the alleged discriminatory action.

*NOTE:

The above model represents a procedure to provide for appeals for employees who have been continuously employed by the State for five years at the time the act, grievance, or employment practice is complained of. Also, for positions subject to the competitive service, and appeals brought under G.S. 126-16 and 126-25.

In preparing a departmental or agency procedure, the State Personnel Commission has recommended that provision be included whereby an employee with less than five years of service may have the right to appeal, through appropriate lines of authority, to the department or agency head.
*Note added, August, 1977.

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POLICY

An employee, regardless of occupation, position, profession, or work performed, may be warned, reprimanded, suspended or dismissed, by an appointing authority. The degree and kind of action to be taken will be based upon the sound and considered judgment of the appointing authority in accordance with the provisions of this policy to assure that the intent of the policy is followed.

The causes for dismissal fall into two categories: (1) Causes relating to performance of duties, and (2) causes relating to personal conduct detrimental to State service. Service. Suspensions may be necessary in either category and may be used in accordance with the provisions of this policy under suspension.

1. Performance of Duties. Employees who are dismissed for unsatisfactory performance of duties should receive at least three warnings. First, one or more oral warnings; second, an oral warning with a follow-up letter to the employee which sets forth the points covered in the discussion; third, a written warning which will serve notice upon the employee that a continuation of the unacceptable practices may result in specific pay causing disciplinary

action or dismissal.

a. First Oral Warning:
The supervisor is responsible for maintaining the per conduct and discipline of employees under his supervision. When some action is necessary the supervisor may give the first oral warning without prior approval of the agency head. The supervisor will talk privately with the employee and do the following:

(1) Review with the employee exactly what is expected of him and why.

(2) Explain to the employee how he had has not met the requirements and why his conduct has been unacceptable.

(3) Allow the employee to give the reasons for his actions or failure.

(4) Make suggestions for correction.

(5) Record the date of the interview and other necessary information for any future use.

b. Oral Warning With Follow-up Letter to Employee:

(1) Review again the points covered in the oral warning that must be corrected, and serve a strong warning that a change in work performance must be made.

(2) Tell the employee he will receive a letter covering the significant points of the discus-

sion.

(3) Review with the agency head the contents of the letter prior to a delivery of the letter to the employee by the supervisor.

Respectfully Submitted,

BY: _____

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